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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Lezmond Mitchell,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
14

No. CV-09-08089-PCT-DGC

ORDER

DEATH PENALTY CASE

15
16 Before the Court is the Motion for Stay of Execution filed by federal death row
17 inmate Lezmond Mitchell. (Doc. 84.) Respondent opposes the motion. (Doc. 88.) For
18 the reasons set forth below, the motion is denied.

19 **I. BACKGROUND**

20 In 2003, Mitchell was sentenced to death under the Federal Death Penalty Act, 18
21 U.S.C. §§ 3591–3598. His conviction and sentences were affirmed on appeal. *United*
22 *States v. Mitchell*, 502 F.3d 931, 942 (9th Cir. 2007), *cert. denied* 553 U.S. 1094 (2008).
23 On May 22, 2009, Mitchell filed a motion for authorization to interview his jurors. (Doc.
24 1.) Specifically, he sought “to interview the jurors about racial and religious prejudice.”
25 (*Id.* at 10.) On September 4, 2009, the Court, pursuant to Local Rule of Civil Procedure
26 39.2(b), denied Mitchell’s request to interview jurors because it was untimely and failed to
27 establish good cause. (Doc. 21.) Mitchell moved to vacate, set aside, or correct his
28 sentence under 28 U.S.C. § 2255. (Doc. 9.) The Court denied his motion on

1 September 30, 2010 (Doc. 56), and the Ninth Circuit affirmed. *Mitchell v. United States*,
2 790 F.3d 881, 883 (9th Cir. 2015), *cert. denied* 137 S. Ct. 38 (2016). The Ninth Circuit
3 issued its mandate on November 6, 2015. (Doc. 70.)

4 Following the United States Supreme Court's decision in *Peña-Rodriguez v.*
5 *Colorado*, 137 S. Ct. 855 (2017), Mitchell moved for relief from judgment pursuant to
6 Federal Rule of Civil Procedure 60(b)(6), citing the decision as grounds to reopen his
7 postconviction proceedings and moving the Court for an order granting access to the jurors
8 from his trial.¹ The Court determined that it had jurisdiction to consider the motion, finding
9 it was not a disguised successive § 2255 motion, but denied the motion on the grounds that
10 *Pena-Rodriguez* specifically noted that the methods of investigating potential racial animus
11 remain governed by local rules, and under the requirements of Local Rule 39.2, Mitchell
12 had failed to demonstrate good cause to allow the interviews. (Doc. 80.)

13 Mitchell appealed. The Ninth Circuit granted a certificate of appealability as to
14 "whether the district court properly denied appellant's motion to re-open his case pursuant
15 to Fed. R. Civ. P. 60(b)(6)." *Mitchell v. United States*, No. 18-17031, 9th Cir. Doc. 10.
16 The appeal is currently being briefed. Mitchell's opening brief was filed August 28, 2019.
17 The answering brief is due September 27, and the reply brief is due no later than
18 October 18, 2019.

19 On July 25, 2019, Warden T.J. Watson at the Federal Correctional Complex (FCC),
20 Terre Haute, Indiana, notified Mitchell by letter that the Director of the Federal Bureau of
21 Prisons set December 11, 2019, as the date for Mitchell's execution by lethal injection.
22 Mitchell filed the pending motion to stay on August 5, 2019.

23 **II. ANALYSIS**

24 When a notice of appeal is filed, jurisdiction over the matters being appealed
25 normally transfers from the district court to the appeals court. *See Marrese v. Am.*
26 *Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) ("In general, filing of a notice

27 ¹ In *Pena-Rodriguez*, the Supreme Court created a narrow exception to the federal "no-
28 impeachment" rule, which prohibits litigants from using jurors' statements to attack the
validity of a verdict, where a juror has made clear statement that indicates he or she relied
on racial stereotypes or animus to convict the defendant. 137 S. Ct. at 869.

1 of appeal confers jurisdiction on the court of appeals and divests the district court of control
2 over those aspects of the case involved in the appeal.”). The Federal Rules of Civil
3 Procedure provide an exception, however, that allows the district court to retain jurisdiction
4 to suspend, modify, restore, or grant an injunction during the pendency of the
5 appeal. *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001); Fed. R. Civ. P. 62(d).

6 Mitchell filed his motion for a stay pursuant to Rule 62(c), now Rule 62(d), of the
7 Federal Rules of Civil Procedure, which provides that “while an appeal is pending from an
8 interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or
9 refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or
10 grant an injunction on terms for bond or other terms that secure the opposing party’s
11 rights.” Fed. R. Civ. P. 62(d). “Rule 62(d) addresses the trial court’s continuing
12 jurisdiction over its rulings on claims for injunctive relief after those rulings have been
13 appealed.” 2 Federal Rules of Civil Procedure, Rules and Commentary Rule 62.

14 Respondent contends that this Court lacks jurisdiction to hear Mitchell’s motion for
15 a stay because Rule 62(d) applies only in the context of injunctions and Mitchell is not
16 appealing an order granting or denying injunctive relief. (Doc. 88 at 5–6.) The Court
17 agrees. “Rule 62(c) [now 62(d)], by its terms, requires that the appealed matter relate to
18 an injunction.” *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, No. CV 09-
19 00598 DAE-KSC, 2011 WL 2441679, at *4 (D. Haw. June 14, 2011); *see Biltmore Assocs.,*
20 *L.L.C., as Tr. v. Twin City Fire Ins. Co.*, No. 2:05-CV-04220-PHX-FJM, 2007 WL
21 2422053, at *1 (D. Ariz. Aug. 22, 2007) (“[A] Rule 62(c) [now (d)] stay is available only
22 when ‘an appeal is taken from an interlocutory or final judgment granting, dissolving, or
23 denying an injunction.’”). Mitchell is appealing this Court’s denial of his Rule 60(b)(6)
24 motion, not an order or judgment on a claim for injunctive relief.

25 In his motion for a stay, Mitchell cites no support for the proposition that Rule 62(d),
26 contrary to its plain language, applies outside the context of an injunction. He relies on
27 *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166
28 (9th Cir. 2001), which held that “[t]he district court retains jurisdiction during the pendency

1 of an appeal to act to preserve the status quo.” *Southwest Marine* does not advance
2 Mitchell’s argument because the case involved an appeal of an order granting an injunction.
3 The court found that under Rule 62(c) (now (d)), “the district court had jurisdiction and
4 discretion to make the post-appeal modifications, which slightly modified and enforced the
5 injunction, to preserve the status quo.” *Id.* at 1165. The case does not suggest that Rule
6 62(d) is applicable outside the context of orders involving an injunction.

7 In *Southwest Marine* the court clarified that Rule 62(d) “grants the district court no
8 broader power than it has always inherently possessed to preserve the status quo during the
9 pendency of an appeal.” *Id.* at 1166. In Mitchell’s case, the status quo is that the Judgment
10 and Order imposing a death sentence have been affirmed by the Ninth Circuit and a
11 mandate has issued. Unlike cases where an injunction is involved, granting a stay here
12 would not aid in preservation of the status quo.

13 In his reply brief (Doc. 90), Mitchell argues that his position is supported by *Jones*
14 *v. Ryan*, No. CV-01-00592-TUC-TMB, 2018 WL 5066494, at *2 (D. Ariz. Oct. 17, 2018).
15 Jones is readily distinguishable. There, Respondents moved for a stay of the issuance of
16 the writ after the petitioner moved for release. The issue was governed by Federal Rule of
17 Appellate Procedure 23(c), a rule not applicable to Mitchell’s case.

18 The remaining cases cited in Mitchell’s reply brief do not convince the Court that it
19 has jurisdiction. In these cases, the district court considered motions for a stay filed
20 pursuant to Federal Rule of Appellate Procedure 8(a)(1)(A). Rule 8(a)(1)(A) provides that
21 “[a] party must ordinarily move first in the district court for . . . a stay of the judgment or
22 order of a district court pending appeal.” Unlike the cases cited in his reply brief, in which
23 a party sought to stay the enforcement of an order pending appeal of that order, in
24 Mitchell’s case there is no pending appeal of the Order or Judgment.

25 For example, in *Harris v. Copenhaver*, No. 1:12-cv-938-AWI-DLB (HC), 2012
26 U.S. Dist. LEXIS 154931 (E.D. Cal. Oct. 26, 2012), the petitioner filed for an injunction
27 under Rule 8(a)(1) after his habeas petition was denied and judgment entered. In *In re*
28 *Halvorson*, No. SACV 18-519-JVS, SACV 18-520-JVS, 2019 WL 3017679, at *4–5 (C.D.

1 Cal. Apr. 1, 2019), one of the parties filed a motion to stay enforcement of a vacatur order
2 pending appeals of the order. In *In re Estates*, No. LA CV13-5286-VBF, 2014 WL
3 12088558, (C.D. Cal. Sept. 30, 2014), the appellant filed a motion to stay in district court
4 after appealing a bankruptcy court's judgment. In *Alliance of Nonprofits for Ins., Risk*
5 *Retention Group v. Barratt*, No. 2:10-CV-1749 JCM (RJJ), 2012 WL 3561963, at *3 (D.
6 Nev. Aug. 16, 2012), the defendant filed for a stay pending appeal of the award and
7 judgment in favor of the plaintiff.

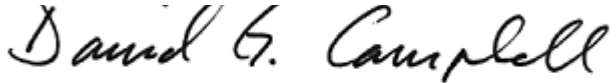
8 Finally, Respondents argue, contrary to Mitchell's position, that Rule 8(a) does not
9 provide an independent basis for jurisdiction. (Doc. 88 at 7.) The Court agrees. While
10 Rule 8(a)(1)(a) describes the process for seeking a stay, Rule 62(d) "regulates the power
11 of the district courts to grant such relief." *Vasile v. Dean Witter Reynolds, Inc.*, 205 F.3d
12 1327 (2d Cir. 2000) (unpublished); see 20 Moore's Federal Practice—Civil § 308.12
13 (2019) ("The grant of a stay or injunction by the district court is regulated by Civil Rule
14 62, not Appellate Rule 8."). Rule 62(d) does not apply to Mitchell's request for a stay.
15 Rule 8 does not independently confer jurisdiction on this Court.

16 **III. CONCLUSION**

17 For the reasons set forth above, the Court lacks jurisdiction to consider Mitchell's
18 motion. Accordingly,

19 **IT IS HEREBY ORDERED** denying Mitchell's Motion for a Stay of Execution.
20 (Doc. 84.)

21 Dated this 30th day of August, 2019.

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24 David G. Campbell
25 Senior United States District Judge
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